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UNITED STATES DISTRICT COURT

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DISTRICT OF MAINE

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UNITED STATES OF AMERICA

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CRIMINAL ACTION

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Docket No. 03-113-P-H

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6

v.

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JOSE DURAN,

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Defendant.

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TRANSCRIPT OF PROCEEDINGS

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Pursuant to notice, the above-entitled matter came on

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for Sentencing Hearing before the HON. D. BROCK HORNBY, in

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the United States District Court, Portland, Maine, on the

14

7th day of October, 2004, at 3:27 p.m.

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APPEARANCES:

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For the Government:

Helene Kazanjian, Esq.

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For the Defendant:

Peter Cyr, Esq.

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Cindy Packard, RMR
Official Court Reporter

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Proceedings recorded by mechanical stenography, transcript
produced by computer.

1 (At 3:27 p.m., defendant present in open court with his
2 counsel, and the following proceedings transpired.)

3 THE COURT: Good afternoon. This is Criminal
4 Number 03-113-P-H, United States v. Jose Duran. The matter
5 is on this afternoon for sentencing. Mr. Cyr, would you and
6 Mr. Duran please stand.

7 Mr. Duran, the purpose of the hearing this afternoon is
8 for me to sentence you, but before I do that, I'm going to
9 hear from the prosecutor, I'm going to hear from your
10 lawyer, I'll hear from you, if you wish to speak to me.

11 I'm going to start by asking some questions of you and
12 your lawyer because I need to be sure that you have read and
13 discussed with him the revised presentence report in this
14 matter as well as the order that I issued on August 26 after
15 I met with your lawyer and the prosecutor because
16 collectively, those documents set forth the issues
17 concerning the guideline sentencing that applies to you.

18 So first of all, Mr. Cyr, have you read and discussed
19 with Mr. Duran the revised presentence report as well as my
20 order of August 26?

21 MR. CYR: Yes, Judge.

22 THE COURT: Did you have enough time to do that?

23 MR. CYR: I did.

24 THE COURT: Mr. Duran, have you used any drugs or
25 alcohol in the last 24 hours?

1 MR. DURAN: No, sir.

2 THE COURT: Are you currently taking any
3 medications?

4 MR. DURAN: Yes, I am.

5 THE COURT: What are you taking? Pull the
6 microphone toward you so I can hear you better.

7 MR. DURAN: I don't know the name of it, it's for
8 depression.

9 THE COURT: Is it something that the jail has
10 prescribed for you?

11 MR. DURAN: Yeah.

12 THE COURT: Are you taking it in the prescribed
13 amount?

14 MR. DURAN: Yeah, the way they give it to me.

15 THE COURT: All right. Does it prevent you from
16 understanding what's happening here this afternoon?

17 MR. DURAN: No.

18 THE COURT: All right. Aside from that
19 prescription, have you used any other drugs or alcohol in
20 the last 24 hours?

21 MR. DURAN: No, sir.

22 THE COURT: Have you read and discussed the
23 revised presentence report with your lawyer?

24 MR. DURAN: Yes, I have.

25 THE COURT: Have you had enough time to do that?

1 MR. DURAN: Yes, I have.

2 THE COURT: It's my understanding from meeting
3 with the lawyers and then from a document that your lawyer
4 filed later withdrawing a couple of the issues that the
5 issues before me at this time are whether a conviction in
6 Paragraph 25 of the presentence report qualifies as a felony
7 offense, and whether the drug quantity is enough to subject
8 you to the career criminal provision, career offender
9 provision.

10 Is that your understanding as well, or Mr. Cyr, do you
11 want to clarify that?

12 MR. CYR: One moment, Your Honor.

13 THE COURT: Yes.

14 (Mr. Cyr and Mr. Duran confer.)

15 MR. CYR: Judge, could you ask the question again,
16 Your Honor?

17 THE COURT: I will. Before I do that, perhaps it
18 would make sense for me to ask you what the remaining issues
19 are, then I'll ask your client whether he agrees.

20 MR. CYR: Thank you, Judge. Your Honor, we
21 have -- we'll be withdrawing the issue with respect to
22 whether the assault and battery conviction should be
23 considered a felony pursuant to the guidelines.

24 I have researched that issue, the law in Massachusetts,
25 there is the penalty -- it is a possible penalty that could

1 exceed one year. In fact, maximum penalty is two years in
2 House of Corrections. So we'll be withdrawing that.

3 In addition, Your Honor, we'll also be withdrawing the
4 issue with respect to quantity in that the quantity is over
5 100 grams of heroin. I have -- this is something that
6 Mr. Duran and I have discussed, and the issue that we have
7 resolved today is whether or not the prosecution version
8 could be determined -- used by this court to determine the
9 particular amount that Mr. Duran was responsible for in the
10 context of the conspiracy.

11 In other words, we were relying on the case, United
12 States v. Colon-Solis. And in that case, the First Circuit
13 ruled and held that even though a defendant pleads guilty to
14 a conspiracy of a particular amount or quantity of drugs,
15 that the fact of him pleading guilty alone cannot be relied
16 upon by the court to make the determination that the
17 defendant was responsible for a particular quantity.

18 And thus, the issue that we had was what does the
19 prosecution version say in this case, and whether the
20 prosecution version can be used by this court to make that
21 determination. And this afternoon, I listened to the
22 transcript of the Rule 11 proceeding.

23 THE COURT: What you mean you listened to the
24 recording?

25 MR. CYR: I'm sorry, Your Honor, that's right. I

1 listened to the recording in which it indicates that you
2 asked Mr. Duran whether he had read and understood the
3 prosecution version, he said yes. Whether there's anything
4 in that version that he disagrees with, he says no. And
5 whether everything in that version is true, and he said yes.

6 Based on my listening to that recording, it does not
7 appear that we can make any argument that Mr. Duran did not
8 admit to that quantity and that he was responsible for that
9 quantity in the context of the conspiracy.

10 And so based on that, I've suggested to Mr. Duran that
11 we withdraw that objection. Of course, Your Honor, he's
12 looking at 22 years, that's a very lengthy sentence, and
13 withdrawing any objection is not an easy thing for him to
14 do. That's what we were discussing.

15 THE COURT: I understand that.

16 MR. CYR: The only issue, Your Honor, that I
17 was -- that we are prepared to raise today is not one that
18 we have discussed before. I tried to get ahold of
19 Ms. Kazanjian late last week, we were not able to connect.

20 And the issue is frankly, and basically, that the
21 guidelines don't apply because of Washington v. Blakely.
22 That is not something I had raised in the presentence
23 conference. It is something that quite frankly came to me
24 that I could argue today on behalf of Mr. Duran.

25 It's an argument that the government has been making.

1 In this case the reason why it benefits Mr. Duran to make
2 that argument is because if the guidelines do not apply,
3 then he is -- he would be sentenced pursuant to the statute,
4 Title 21, Section 841, and pursuant to that statute, the
5 sentencing range would be a minimum of 10 years and a
6 maximum of life.

7 And we thus would be able to argue for a sentence of 10
8 years. Whereas, if the guidelines apply, and given the fact
9 we've conceded that he's a career offender, the lowest
10 amount that we can argue is a sentence of -- it's a sentence
11 of essentially 21.8 years. But it's the low end of the
12 range of a base offense level of 34, and a Criminal History
13 Category of VI.

14 So I would make that argument, Your Honor, if you would
15 allow us to. I do understand that this court has ruled that
16 the guidelines do apply and that Washington -- that Blakely
17 v. Washington does not render the guidelines completely
18 unconstitutional and completely ineffective.

19 However, we would like to preserve that argument for
20 appeal, and depending on what the Supreme Court does with
21 that case, we -- may give us an opportunity to come back and
22 visit the sentence.

23 THE COURT: I understand. Mr. Duran, what your
24 lawyer has told me is that he has and you have no further
25 disagreement with the contents of the presentence report.

1 That if the guidelines apply, that the sentence that you're
2 looking at is between 262 and 327 months.

3 He wants to argue that the guidelines are
4 unconstitutional and should not apply.

5 The Supreme Court is right now considering that, they
6 had oral argument earlier this week on a case, a case that I
7 decided, a case from another part of the country. One of
8 the arguments before the Supreme Court apparently is whether
9 the guidelines can apply in part or not at all. And I have
10 no idea what decision they'll render.

11 But basically, he's saying the facts in the presentence
12 report are undisputed. Do you agree?

13 MR. CYR: Judge, if I could just clarify that.

14 THE COURT: Yes.

15 MR. CYR: The facts in the presentence report are
16 undisputed to the extent the quantity is over 100.

17 THE COURT: All right.

18 MR. CYR: But nothing beyond that.

19 THE COURT: I appreciate that. That's an
20 appropriate clarification. He's telling me that the facts
21 in the presentence report are undisputed, that the drug
22 quantity is over 100 grams, and that you are a career
23 offender under the definitions of the guidelines.

24 Do you agree?

25 MR. DURAN: Yes.

1 THE COURT: All right. Now I have to ask you
2 also, Mr. Duran, about the prior convictions that are
3 alleged in the information the government filed. Mr. Cyr,
4 have you talked with your client about that?

5 MR. CYR: I have, Judge.

6 THE COURT: I have to ask him if he affirms or
7 denies that he was previously convicted as charged in the
8 information that was filed. Do you have that in front of
9 you so he can look at it as we talk about it?

10 MR. CYR: Yes, Judge.

11 THE COURT: I draw your attention then, Mr. Duran,
12 to the information charging prior convictions that was filed
13 on February 5 of this year.

14 Do you affirm or deny that you were previously
15 convicted as is alleged there with respect to those two
16 convictions that are set forth?

17 (Mr. Cyr and Mr. Duran confer.)

18 THE COURT: Do you agree or deny that you were
19 convicted as they say?

20 MR. DURAN: Yeah.

21 THE COURT: You agree. I must inform you that any
22 challenge to those two convictions cannot be raised later.
23 You understand that?

24 (Mr. Cyr and Mr. Duran confer.)

25 MR. CYR: Judge, just to qualify that, it's our

1 understanding that they cannot be challenged in this court.

2 THE COURT: That's correct, I'm talking only about
3 this court. They cannot be challenged here, in terms of
4 their effect on your sentence here, do you understand that?

5 MR. DURAN: Yes, sir.

6 THE COURT: All right. Thank you, then you can be
7 seated. I'll hear from the lawyers. I'll hear from the
8 prosecutor first. Ms. Kazanjian.

9 MS. KAZANJIAN: Yes, Your Honor. I have certified
10 copies of the convictions in Paragraphs 22, 27, and 25.
11 Paragraphs 22 and 25 -- excuse me, 22 and 27 are the drug
12 trafficking convictions.

13 I believe in the presentence report I mentioned at the
14 presentence conference that Paragraph 22 indicates it was
15 only a possession when in fact it is possession with intent
16 to distribute as is set forth in the information. I'd like
17 to just offer those exhibits, those three exhibits to the
18 court for purposes of completing the record.

19 THE COURT: All right. Let me just clarify what
20 you just said, you're saying that the information charge
21 which also happens to be Paragraph 22 in fact was a
22 trafficking, not a mere possession charge.

23 MS. KAZANJIAN: Correct.

24 THE COURT: I understand. So that the presentence
25 report is inaccurate in reflecting possession; is that

1 right?

2 MS. KAZANJIAN: Correct, but the 851 notice is
3 accurate. I'd like to offer those as Government's Exhibits
4 1, 2, and 3. Government's Exhibit 1 is the criminal
5 conviction in Paragraph 22 of the presentence report with
6 the modification just described.

7 Government's Exhibit 2 is the assault and battery
8 conviction, certified court documents relating to the
9 assault and battery conviction. In that instance, I have
10 included a charging instrument which reflects that the
11 defendant was charged with assaulting and beating an
12 individual, which is the -- confirms that it is a violent
13 felony and a predicate for career offender, and I believe
14 the defense has conceded that.

15 THE COURT: So 2 is Paragraph 25?

16 MS. KAZANJIAN: That's correct, Your Honor.

17 THE COURT: Go ahead.

18 MS. KAZANJIAN: And Government's Exhibit 3 is
19 Paragraph 27.

20 THE COURT: Any objection to those exhibits?

21 MR. CYR: No objection.

22 THE COURT: They're admitted without objection.

23 MS. KAZANJIAN: On the Blakely issue raised by the
24 defense today, I'd just like to briefly respond to that. In
25 this particular instance, obviously the government preserves

1 its argument it's made in other cases which is that the case
2 of Blakely v. Washington does not apply to the federal
3 sentencing guidelines. As the court has indicated the
4 Supreme Court is considering that issue.

5 THE COURT: Just a moment. Blakely as you
6 interpret it won't have any effect on this sentence anyway,
7 will it?

8 MS. KAZANJIAN: That's my second point. That in
9 this particular instance, even if the court were to apply
10 Blakely to the federal sentencing guidelines, it would not
11 have any impact on this particular case because it does not
12 affect any of the fact finding, any of the finding of the
13 facts that are relevant to imposing sentence under the
14 federal sentencing guidelines.

15 Under that case, the government does not ask that the
16 court throw out the sentencing guidelines, that's only where
17 the government has made that argument where the court is in
18 a position where it is not applying certain provisions of
19 the guidelines and applying other provisions of the
20 guidelines, and we believe the guidelines have to be applied
21 as a whole.

22 In this case the guidelines can be applied as a whole,
23 therefore, there is no need to throw out the sentencing
24 guidelines. And we would ask the court apply them as set
25 forth in the presentence report. The defendant is a career

1 offender, that his base offense level should be 37. And
2 that there should be three points reduction for acceptance
3 of responsibility resulting in a base offense level of 34.

4 And then we would ask that the court make those
5 findings and that the court impose a sentence at the low end
6 of the sentencing guidelines that is applicable to the level
7 34, Criminal History VI.

8 THE COURT: Thank you, Ms. Kazanjian. Mr. Cyr,
9 for the defendant.

10 MR. CYR: Your Honor, the sentence that we are
11 asking that this court to impose, clearly we don't think
12 that even at a level 34, and a Criminal History Category of
13 VI, the low end of that range is 262 months. That is in
14 terms of years, that's 21.8 years. That's a lot of time to
15 sentence an individual to.

16 And in fact, it's Mr. Duran -- it's going to be the
17 bulk of the years of his life. He's around 30 years old
18 now, he's going to be an older man when he gets out of jail.

19 It's a sentence that I personally given the conduct
20 that he has admitted to and even his criminal history, Your
21 Honor, I feel personally is excessive. It's a lot of time
22 to take someone's liberty away, it's a lot of time. It's
23 essentially a life sentence for Mr. Duran.

24 He's going to lose the opportunity to be with his
25 family who is here. He's going to lose the opportunity to

1 raise his children. It's a very heavy sentence, it's
2 severe, very severe in and of itself.

3 So the bottom line is that the most that this court
4 should impose is the bare minimum of that range, the 262
5 months. There's no need for any more than that.

6 The reason I raise the Blakely issue is because it
7 does -- if the Supreme Court does say that the guidelines
8 are unconstitutional in their entirety and that they can't
9 be applied, then what this court would need to do would be
10 to go to the statute, the old statute, and then go back to
11 its old ways of dishing out and handing out sentences.

12 And in that case, there would be a range of 10 years to
13 life. And that's a huge range. However, at least in that
14 case, we could make an argument that 10 years probably would
15 not be -- would not be enough given the fact that's the
16 minimum in that he has obviously one conviction and it's a
17 particular quantity. Maybe if he just had that one
18 conviction, and it was just that quantity, then the 10 years
19 would be sufficient.

20 However, we know that Mr. Duran has a couple of
21 additional convictions, so it might not be appropriate to
22 impose a sentence under that regime of perhaps 12 years,
23 which is still a lot of time to keep Mr. Duran off the
24 streets, to punish him for his conduct, and to convince him
25 through that, the harsh means that we've devised as far as

1 incarceration that his conduct is inappropriate, and he
2 shouldn't be out there committing these crimes any more.

3 So in a sense what I'm suggesting to the court, and
4 although I realize that it doesn't have much bearing given
5 the fact that the court is -- most likely ruled the
6 guidelines do apply, that a better sentence in this case
7 would probably be much closer to the range of 12 years,
8 would satisfy all of the prerequisites through the statute,
9 would do what it would need to do. 22 years is -- simply is
10 just too much.

11 As I've indicated, Your Honor, or I haven't indicated
12 this yet, but part of what's going on here in this case is
13 that Mr. Duran was using heroin, addicted to heroin, and I'm
14 sure, I know you've heard this before, and I've worked with
15 people who have this addiction, it's a severe addiction.

16 And he had it, it's in the presentence report. He had
17 a drug problem, he's had a drug problem for a long time. He
18 has attempted, and he has gone to some rehabilitation
19 programs. He's tried to kick the habit, he's gone back to
20 the habit.

21 During the time of this conspiracy, he was in the
22 process of trying to kick the habit, continuing on. He had
23 a slip, he started using again, and he reverted back to his
24 old means of well, how do I supply this habit, I can sell
25 the drugs to get a little extra money to supply my own

1 habit.

2 It's a sad state of affairs, Judge, it's very sad.

3 It's a bad drug, it messes up a lot of people's lives. And
4 it's just hard to swallow when someone gets sentenced to 22
5 years for selling those drugs. It just is.

6 I don't know quite what else to tell this court other
7 than his family is here to support him. They're going to
8 miss him. He's -- clearly did not expect the 22 year
9 sentence when he was committing this conduct.

10 Of course the federal statute and the guidelines are a
11 lot harsher than a lot of other state sentencing regimes,
12 and a lot of times, I would make the argument that if
13 Mr. Duran had known that he'd be going to jail for 22 years
14 for doing what he was doing, maybe that would -- that would
15 have stopped him. I don't know.

16 I would hope that it is true that if other people learn
17 of this sentence that they may say, jeez, he was doing what
18 I'm doing, he got 22 years, maybe I should stop. That is
19 the purpose, one of the purposes of handing out a sentence
20 such as this to inform other people that they need to stop
21 their conduct.

22 I'm not quite sure it exactly works that way. I would
23 hope it does. It didn't work that way for Mr. Duran. The
24 sentences vary. Massachusetts, you can get picked up for
25 selling heroin, you can get a sentence like he did in one of

1 his prior convictions of five years. And most of it is
2 suspended and probation.

3 I'm not quite sure where I'm going with that, Judge,
4 just -- and I don't want to burden the court's time, but
5 then again, I do want to emphasize the length of this
6 sentence is very long.

7 Mr. Duran has pleaded guilty to this offense, he's
8 taken responsibility for this offense. It wasn't an easy
9 thing to do at all, but he's done that. And I would just
10 ask that you sentence him to the lowest amount of time
11 possible pursuant to the guidelines, if in fact you
12 determine that the guidelines do apply in this case.

13 If you determine the guidelines don't apply, given the
14 decision in Blakely v. Washington, then I would ask for a
15 sentence of 12 years. Thank you, Judge.

16 THE COURT: Thank you, Mr. Cyr. Mr. Duran, as a
17 defendant before me for sentencing, you have the right to
18 speak to me yourself, you can tell me anything you want me
19 to know, especially anything that would lead me to be
20 lenient with you. I invite you to do that. Pull the
21 microphone toward you so I can hear you well.

22 MR. DURAN: Your Honor, I'm sorry if I caused any
23 inconvenience in the state of Maine, for, you know, doing my
24 wrongdoings, I apologize.

25 And I'll ask you for consideration, you know, I have a

1 family. I didn't grow up in the wrong neighborhood, you
2 know, it wasn't meant, you know, for me to grow up doing
3 what I've done, you know what I mean. My family, they
4 raised me up right, just I chose the wrong path. Just, you
5 know, I just apologize for causing any inconvenience.
6 That's all I can say.

7 THE COURT: Thank you, Mr. Duran. Anything
8 further, Mr. Cyr?

9 MR. CYR: Judge, we would ask that you recommend
10 the 500 hour program, that would certainly be a benefit to
11 Mr. Duran.

12 THE COURT: Anything further, Ms. Kazanjian?

13 MS. KAZANJIAN: Nothing.

14 THE COURT: Thank you. I've previously read the
15 revised presentence report. I've read all of the documents
16 that have been filed in this matter. And now that I've
17 heard from the lawyers and heard from Mr. Duran himself, I
18 will make my findings of fact and conclusions of law and
19 impose sentence.

20 I find the facts as set out in the revised presentence
21 report with these amendments. I find that the drug quantity
22 exceeded 100 grams of heroin. It's not necessary for me to
23 determine by how much it exceeded that because that
24 establishes the relevant base offense level and also the
25 statutory application.

1 And in light of the prosecution version and the
2 defendant's statements to me at the Rule 11 hearing, and his
3 pleading guilty to the indictment, I find that the standards
4 of Blakely are satisfied for that quantity in excess of
5 100 grams without specifying how much in excess.

6 The base offense level therefore would be 26 on that
7 basis, but the defendant has been convicted of two previous
8 felonies, one involving trafficking of a controlled
9 substance, one involving assault and battery. When I use
10 the term felonies, I mean within the meaning of federal
11 guidelines.

12 And since this offense involves conspiracy to
13 distribute and possess with intent to distribute heroin, and
14 he was more than 18 at the time he committed it, he is a
15 career offender within the meaning of Guideline 4B1.1. And
16 therefore, the base offense level is 37.

17 He has accepted responsibility, and so I give him a
18 three level reduction for acceptance of responsibility to a
19 total offense level of 34.

20 Because he is a career offender, the criminal history
21 is the highest category, Category VI, and that means that
22 the guideline sentencing range is 262 to 327 months.

23 The period of supervised release is eight years.

24 I find that he does not have the ability to pay any
25 fines.

1 And those are my guideline findings. Are there any
2 errors or omissions from the government?

3 MS. KAZANJIAN: No, Your Honor.

4 THE COURT: From the defense?

5 MR. CYR: No, Judge.

6 THE COURT: Let me address the Blakely issue. It
7 is true that the Supreme Court of the United States in June
8 decided a case that has had a dramatic effect on sentencing
9 and had a confusing effect such that the Federal Judges are
10 quite uncertain as to what parts of the guidelines can
11 continue to be affected or what parts cannot.

12 I decided a sentence soon after Blakely in this court
13 that was appealed to the United States Supreme Court, and it
14 is now considering that case along with another case from
15 the Seventh Circuit. And we hope that we will have a
16 decision soon in terms of the status of the guidelines.

17 The active Judges of this District since Blakely have
18 been applying the guidelines as follows, that where the
19 underlying factors are stipulated, that there can be
20 enhancements in the guidelines. That where they are not
21 stipulated, that indeed, they either must go to the jury for
22 determination beyond a reasonable doubt as part of the trial
23 or else those enhancements cannot be taken into account, but
24 that there's no prohibition in dealing with things like
25 reductions such as for acceptance of responsibility as I

1 just applied here.

2 We have not thrown the guidelines out altogether.

3 Mr. Cyr is right to raise that argument here, to preserve it
4 because there's no indication at this point what the Supreme
5 Court ultimately will do.

6 It may well be that they will declare the guidelines
7 unconstitutional in their entirety and leave some greater
8 leeway or they may not. So the issue is preserved, but I do
9 not at this point find the guidelines to be
10 unconstitutional. Instead, I find that they can apply here
11 consistently with Blakely, and that I do therefore so apply
12 them.

13 Mr. Duran, I'm going to sentence you to the bottom of
14 the range. It doesn't give me any pleasure to impose a
15 sentence of 262 months on a 30-year-old man. That's a long
16 time by anybody's calculation. It's something that you have
17 brought upon yourself by your past criminal conduct. I
18 don't say that to berate you, simply is the fact that this
19 is the law that Congress has imposed because of the scourge
20 of drugs like heroin and other drugs.

21 Nevertheless, it is a huge sentence that I know is
22 something that you probably can't deal with or comprehend at
23 the moment, and that will be -- it's a great tragedy for you
24 and for your family. I will recommend the drug treatment
25 program.

1 I urge you once you get over the emotional reaction of
2 today to take advantage of any prison programs that are
3 available because as you're in there, life is going to go
4 on, it's going to change. And you need to take advantage of
5 every educational and drug treatment program you can because
6 at some point you will come back out, and I don't think you
7 want to turn around and go back in again. So I urge you to
8 take advantage of every program that the Bureau of Prisons
9 has to offer.

10 At this time, the defendant will stand for sentencing.

11 The defendant is hereby committed to the custody of the
12 United States Bureau of Prisons to be imprisoned for a total
13 term of 262 months.

14 I recommend him for the intensive 500 hour drug
15 treatment program.

16 He will be remanded to the custody of the United States
17 Marshal.

18 Upon his release from prison, he shall be on supervised
19 release for a term of eight years.

20 He shall report to the probation office in the district
21 to which he is released within 72 hours of release.

22 He shall not commit another federal, state, or local
23 crime.

24 He shall not illegally possess a controlled substance.

25 He shall not unlawfully use a controlled substance.

1 He shall submit to one drug test within 15 days of his
2 release from prison, and at least two, but not more than 70
3 drug tests per year thereafter as directed by the officer.

4 He shall comply with the standard conditions adopted by
5 this court and the following additional conditions.

6 1. He shall not use or possess any controlled
7 substance or intoxicant including alcohol and shall
8 participate in a program of drug and alcohol abuse therapy
9 to the satisfaction of the supervising officer.

10 This shall include testing to determine if he's used
11 drugs or intoxicants. He shall submit to one test within 15
12 days of release and at least two more tests during
13 supervision, but no more than 70 per year as directed by the
14 officer. He shall pay or copay for services during such
15 treatment to the officer's satisfaction.

16 He shall not obstruct or attempt to obstruct or tamper
17 in any fashion with the efficacy and accuracy of any testing
18 for drugs or intoxicants.

19 Criminal monetary penalties are the special assessment
20 of \$100.

21 I find that he does not have the ability to pay any
22 fine. I therefore waive the fines except for the special
23 assessment.

24 Special assessment is due and payable in full
25 immediately.

1 Now Mr. Duran, you have the right to appeal the
2 sentence that I just imposed. In order to do that, you have
3 to file with the clerk of this court within 10 days from
4 today a written notice of appeal. If you fail to do that,
5 you will lose your right of appeal.

6 If you want to appeal your sentence and cannot get your
7 lawyer to file that notice, you can ask for the clerk of
8 court to file the notice for you, and the clerk will do it,
9 but it has to be within the 10 days.

10 If you like, you can ask right now out loud here in the
11 courtroom for the clerk to file that notice, and the clerk
12 will do it.

13 MR. DURAN: Yes.

14 THE COURT: The clerk will file the notice. If
15 you cannot afford to prepay the costs of taking the appeal,
16 you can ask permission to proceed without prepaying costs,
17 and if you qualify financially, you'll be permitted to do
18 that.

19 Do you understand all that I've told you?

20 MR. DURAN: Yes, I do, Your Honor.

21 THE COURT: Anything further at this time from the
22 government, Ms. Kazanjian?

23 MS. KAZANJIAN: No, Your Honor.

24 THE COURT: From the defense, Mr. Cyr?

25 MR. CYR: No, Your Honor.

1 (Mr. Cyr and Mr. Duran confer.)

2 MR. CYR: Judge, to the extent that you have the
3 authority, I'm not sure you have with respect to -- respect
4 to recommending where a particular person is placed in the
5 Bureau of Prisons, Mr. Duran is requesting that you
6 recommend he be placed at Fort Devens. I don't have any
7 information as far as whether that would be a facility that
8 would be appropriate for Mr. Duran, but he is making that
9 request because of the proximity to his family.

10 THE COURT: His family is in Massachusetts?

11 MR. CYR: It is, Judge, yes.

12 THE COURT: Mr. Duran, what I can do is I will
13 point out to the Bureau of Prisons that your family is in
14 Massachusetts and recommend that you be assigned to an
15 institution where they can visit you.

16 Now whether that will be Devens or somewhere nearby, I
17 can't say because the Bureau of Prisons takes into account
18 security classification that they assign to you, where they
19 have room, the various programs that are available, but I do
20 put in the judgment that will issue that your family is in
21 Massachusetts, and I recommend that you be assigned to an
22 institution nearby where they can visit you.

23 Anything further?

24 MR. CYR: No, Judge.

25 THE COURT: All right. Good luck to you,

1 Mr. Duran. Something else?

2 MR. CYR: He does -- he would like an opportunity
3 to speak to his family.

4 THE COURT: Well, that's up to the Marshal's
5 Office. He's in the security of the Marshal's Office in
6 terms of how that takes place. Anything further?

7 MR. CYR: No, Judge.

8 THE COURT: Thank you. The court will stand in
9 recess.

10 (At 4:05 p.m., the foregoing proceedings were concluded.)

11 CERTIFICATE

12

13 I hereby certify that the foregoing is a true and
14 correct transcript of my stenographic notes of the
15 proceedings held in the above-entitled matter.

16 Dated this 12th day of January, 2005.

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18 /s/ Cindy Packard
Official Court Reporter

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